



PBC support strategy—consultation paper, November 2016

Submission from the Registrar of Indigenous Corporations

Background

The Registrar of Indigenous Corporations

The Registrar is an independent statutory office holder who administers the *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (CATSI Act). The CATSI Act guides how Aboriginal and Torres Strait Islander corporations are run. The CATSI Act commenced on 1 July 2007.

The Registrar's office (ORIC) supports and regulates Aboriginal and Torres Strait Islander corporations that are incorporated under the CATSI Act. It does this in a variety of ways: by advising Aboriginal and Torres Strait Islander groups on how to incorporate, by training directors, members and key staff in good corporate governance, by making sure corporations comply with the law and by intervening when needed.

All registered native title bodies corporate (RNTBCs or PBCs) are required to be registered under the CATSI Act.

The Registrar also has limited regulatory powers under the *Native Title Act 1993* and the Native Title (Prescribed Bodies Corporate) Regulations 1999 (PBC Regulations).

Previous submissions

The Registrar has previously made a number of submissions in relation to building the capacity of PBCs or supporting PBCs. These have included submissions to:

- the Department of Families, Housing, Community Services and Indigenous Affairs on the discussion paper, *Optimising Benefits from Native Title Agreements*—February 2009
- Deloitte Access Economics on its report, *Review of the roles and functions on native title organisations*—March 2014
- the Expert Indigenous Working Group on native title advising on the discussion paper entitled, *A more efficient and effective native title system*—July 2015
- the Department of Prime Minister and Cabinet (PM&C) on the consultation paper, *Capacity building for native title corporations*—October 2015.

The key points of previous submissions are:

- RNTBCs currently have limited capacity and high levels of disputation
- there is a need for greater governance, training, administration and dispute resolution support to RNTBCs in the post-determination environment
- there needs to be greater coordination and consistency in corporate governance training for PBCs provided or funded by the Commonwealth
- there is a need for a low cost arbitrator of disputes regarding who is and isn't a traditional owner, and related native title matters, in the post-determination environment
- there is a need for a defined regulator of the roles and functions of PBCs under the *Native Title Act 1993* and PBC Regulations
- the Registrar is well placed to provide an expanded regulatory and support role in relation to PBCs

- the Central Land Council model of post-determination administrative and legal support to native title bodies is effective and low cost and builds on the existing funding, relationships and services of native title representative bodies and service providers.

These key points are equally relevant for the purposes of the current consultation paper.

Aboriginal and Torres Strait Islander corporations

As at 30 June 2016 there were 2,781 Aboriginal and Torres Strait Islander corporations registered under the CATSI Act. Of these, 156 were RNTBCs (up from 144 as at 30 June 2015).

The majority of the members and directors of an Aboriginal or Torres Strait Islander corporation registered under the CATSI Act must be Aboriginal or Torres Strait Islander people. Just under 60 per cent of all Aboriginal or Torres Strait Islander corporations are located in remote or very remote parts of Australia.

RNTBCs

The majority of RNTBCs are located in Queensland, Western Australia and the Northern Territory.

RNTBC overview for the 2014–15 financial year from data reported to the Registrar:

Number

Total number of RNTBCs — 144 registered

Income

Combined total income — \$112,018,583

Number that reported nil income — 66 (45%)

Average income — \$1,436,136*

Highest income — \$26,334,775

Assets

Combined total assets — \$235,168,371

Number that reported nil assets — 75 (52%)

Average assets — \$3,408,237*

Highest assets — \$108,143,239

Employees

Combined total number of employees — 273

Number that reported nil employees — 104 (72%)

Average number of employees — 6.8*

Capacity

With 45 per cent reporting nil income, 52 per cent reporting nil assets and 72 per cent reporting nil employees, RNTBCs have limited capacity to undertake their statutory functions under the *Native Title Act 1993* and the PBC Regulations. Many of those functions are highly technical, complicated and time limited.

There is an opportunity for NTRBs and NTSPs to play a greater role in providing administrative, legal, dispute resolution and operational support to RNTBCs in the post-determination environment given their historical relationships with traditional owners and detailed knowledge of the native title determination. The Central Land Council (the CLC) very successfully plays such a role with native title bodies (under both the Commonwealth and Northern Territory legislation) in their footprint.

The native title regime in the Northern Territory is the most mature in the country, as is the support role played by the CLC. The CLC through its associations unit provides a high level of support to corporations and their members in the management and investment of native title funds. This includes administration, financial and general record keeping, accounting and meeting (directors and members) support as well as limited consumer protection and dispute resolution for traditional owners. The native title corporations supported by the CLC are fully compliant with their CATSI Act obligations, and are transparent and well managed. Native title funds are allocated by traditional owners to long term investments and cash payments (to meet the current financial needs of traditional owners). The Registrar also receives very few complaints regarding the native title corporations supported by the CLC.

The unit is funded from a voluntary five per cent levy on the native title funds under management. Corporations with large amounts of funds under management in effect cross-subsidise those corporations with smaller funds under management. The not-for-profit nature of the CLC and its close historical links with traditional owners ensures a low cost-traditional owner focused model for funds management. The CLC contracts in accounting, legal, funds management and audit services as required.

There is an opportunity for NTRBs and NTSPs to adopt the CLC model of support to RNTBCs. This could be funded by a voluntary levy, as is the case with the CLC, or from existing resources as claims work reduces over time. The success of the CLC model suggests that this would improve governance and administration within RNTBCs, address capacity issues within the RNTBC sector, reduce disputation and improve the management of native title interests and funds. It would also ensure that the native title skills base developed over many years by NTRBs and NTSPs is not lost to the sector as claims works declines over time.

Question 1: engagement with PBCs

PBCs have existing relationships with NTRBs/NTSPs, AIATSIS and the Registrars of Indigenous Corporations and the National Native Title Tribunal. These parties are either independent or have fiduciary or statutory duties to act in the best interests of PBCs and/or common law holders.

Only a small number of PBCs have existing relationships with funding agencies, as evidenced by the large percentage of PBCs with no income.

Governments can often be parties to decisions regarding native title, such as future acts or opposing/consenting to claims, and may therefore have interests contrary to the interests of common law holders.

Engagement by governments with PBCs should be through or led by existing relationships, unless a PBC expresses a desire to directly engage with government.

Questions 2 - 4: funding for PBCs

Existing funding within PM&C is limited (approximately \$10 million per annum¹).

A portion of that funding is only available to NTRBs/NTSPs. Including the funding available to NTRBs/NTSPs, the funding equates to only \$64,103 for each of the 156 PBCs registered as at 30 June 2016. The number of PBCs continues to grow.

It would be difficult for a PBC to develop capacity or put in place support arrangements with external providers for only \$64,000 per annum. If the funding was restricted to a smaller set of PBCs or 'targeted' this would result in two categories of PBCs, those with capacity and those with nil capacity. It would be difficult for the PBCs with nil capacity to function or meet their statutory obligations under the *Native Title Act 1993* and PBC Regulations.

It may be more effective and deliver greater economies of scale to fund NTRBs/NTSPs or regional bodies to provide support to PBCs, rather than individually fund PBCs.

Better coordination of existing funding, as suggested in the consultation paper, would be welcomed. Providing existing program funding that is related to land and/or native title to PBCs would assist in building the capacity of PBCs as well as provide visible linkages between native title and economic development. For example, diverting existing funding for ranger programs and Indigenous Protected Areas to PBCs that hold determinations for the relevant land.

Question 5: support services

The Registrar supports the PBC Support Forum convened by the National Native Title Tribunal. This initiative is a useful forum to develop strategies for the better coordination of support services to PBCs.

Questions 6 – 7

These are questions largely for PBCs.

The Registrar provides free corporate governance training, including PBC specific training, to the directors and members of PBCs to assist in building their internal capacity. A number of Commonwealth Government departments and agencies also provide or fund corporate governance training for PBCs.

The Registrar recommends the establishment of a register of accredited providers of corporate governance training for Aboriginal and Torres Strait Islander organisations, the accreditation of training materials and modules and a single register of corporate governance training courses provided or funded by the Commonwealth. The Registrar's office would be the appropriate body to undertake or manage these activities.

¹ PBC support strategy – consultation paper, October 2016, p. 2

This approach would result in improved coordination and consistency and a quality framework for the delivery of corporate governance training.

Question 8

RNTBCs are the subject of high levels of complaints to the Registrar. RNTBCs are almost three times more likely to be the subject of a complaint to the Registrar than all Aboriginal and Torres Strait Islander corporations combined. For the financial year 2013–14 the Registrar received complaints about 36 per cent of RNTBCs, compared to 13 per cent of all corporations.

The majority of complaints to the Registrar regarding RNTBCs relate to disputes regarding who is and isn't a common law holder/traditional owner (not membership of the RNTBC) and the terms of the native title determination. These matters are currently outside the jurisdiction of the Registrar and cannot be resolved by the Registrar.

For the resolution of native title disputes traditional owners can in the pre-determination environment access the funded support and services of the native title representative bodies (NTRBs) and service providers (NTSPs) and the arbitration powers of the Federal Court. Any litigation is funded through the NTRBs and NTSPs. Post-determination there is currently limited support and services from the NTRBs and NTSPs and no ongoing arbitration role of the Federal Court (only limited dispute resolution through the National Native Title Tribunal).

The lack of a low-cost arbitration body in the post-determination environment to finally determine who is and isn't a traditional owner, and related native title issues, results in long standing unresolved disputes that affect the governance of many RNTBCs. Currently the only recourse is to litigation in the courts, and most RNTBCs and traditional owners do not have the resources to fund such litigation, or if they do it results in a significant diminution of their native title funds to resolve the matter.

There is an opportunity for NTRBs and NTSPs to play a greater role in complaint and dispute management in the post-determination environment given their historical relationships with traditional owners and detailed knowledge of the native title determination.

The Registrar provides a mediation and dispute resolution services to corporations registered under the CATSI Act. However, this service is currently limited to disputes regarding governance and breaches of rule book provisions. It does not extend to a PBC's compliance with their statutory obligations under the *Native Title Act 1993* and PBC Regulations, or native title matters.

There is also a need for a low cost and simple arbitration process to resolve native title complaints and disputes that cannot be resolved through dispute resolution and mediation.

The Registrar's jurisdiction and powers could be extended to include the investigation and determination of:

- disputes regarding the determination of whether or not a person is a common law holder
- instances of non-compliance with statutory obligations under the *Native Title Act 1993* and PBC Regulations
- related native title issues.

Question 9 – regulator of PBC Regulations

The Registrar agrees that there is currently a regulatory gap in the native title system in relation to the oversight of PBCs' compliance with the *Native Title Act 1993* and PBC Regulations—particularly consultation processes, membership of the PBC or common law holder group and use and management of native title funds.

As stated above, the Registrar's jurisdiction and powers could be extended to address the regulatory gap.

Question 10 – native title monies not held by the PBC

A large number of entities that manage native title and native title interests and rights are not PBCs and are registered under a variety of Commonwealth, state and territory incorporating legislation (this includes trusts and non-corporate trustees).

The PBC data retained by the Registrar and disclosed above confirms that very little native title income and assets are held and managed by PBCs (this includes subsidiaries, where consolidated reporting applies). There is no reliable data on the number or size of native title agreements or funds under management on behalf of common law holders. Governments, industry and common law holders regularly raise concerns around particular native title agreements, including the imbalance in the bargaining capacity of the parties, and the use of native title funds.

Greater transparency and accountability around the use of native title benefits would be welcomed by the Registrar. This could be achieved through:

- addressing the regulatory gap in the native title system in relation to the oversight of PBCs' compliance with the *Native Title Act 1993* and PBC Regulations (as stated above)
- requiring native title funds to be held by a PBC or entity controlled by the PBC
- the registration of all native title agreements.

The Registrar submits that the transparency and accountability of the management of native title funds is at its highest where those funds are managed by a PBC, or a subsidiary of a PBC.

The Registrar supports a proposal that would mandate the payment to and management by a PBC (or a fully owned subsidiary of the PBC) of native title funds. This would apply the CATSI Act framework across the management of native title interests and funds—statutory rights for members including the right to information, the ability to access the corporation's dispute resolution processes, and the right to call and attend meetings and ask questions; yearly financial reporting to members; auditing if income and assets are of a significant size, yearly meetings of members; and an active regulator.

This would not prevent the contracting by a PBC or its subsidiary of professional funds management or trustee services from other entities—for example the CLC model.

Alternatively or in addition to, the Registrar supports the establishment of a native title agreements registration function.² This function would:

- receive related native title agreements following execution
- maintain a confidential register of those agreements
- analyse those agreements and provide a statistical annual report to government, including any trends and issues arising from that analysis.

This would enable the collection of reliable data for use by government, the native title sector and the public. This data would inform future policy development relating to future acts or development related agreements and benefit management. The requirement to register these agreements may also in and of itself promote improved agreements structures and outcomes.

The agreements registration function could be undertaken by the Registrar.

The agreements registration function would not duplicate the existing registration function of the National Native Title Tribunal (NNTT), but would instead focus on development related agreements as these are the most likely to contain significant financial benefits. This would collect ancillary agreements (commonly attached to development related agreements such as Indigenous Land Use Agreements and right to negotiate agreements), which are not collected by the NNTT. Ancillary agreements often contain substantive elements of the agreement including details of the benefits package and implementation arrangements.

To preserve the commercial information contained in agreements, there would be a legislative requirement that the Registrar receive and deal with the agreements on a confidential basis.

The agreements registration function, with its focus on the nature and sustainability of benefits under agreements, is consistent with the capacity building role the Registrar has in relation to Aboriginal and Torres Strait Islander corporations. As an independent statutory officer, the Registrar will assuage any concern about undue government interference in agreements.

Key aspects of the function would include analysis and a strong focus on governance; matters that are consistent with the registrar's current functions, and have a very different focus to the registration activities carried out by the NNTT.

The Registrar would produce an annual report to the Minister analysing registered agreements, including trends and issues arising from the registered agreements.

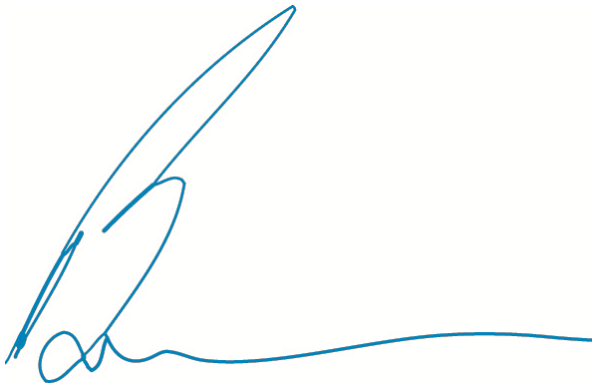
Question 11 – decision making processes

The lack of capacity of most PBCs is most likely limiting the use of the processes referred to in the consultation paper. Improving information dissemination would assist but to be effective would need to be part of a broader strategy of building the internal capacity of PBCs.

² Extracted from previous submission, FaHCSIA.

Additional consultation

The Registrar would welcome further opportunities for consultation on the elements of the consultation paper.

A handwritten signature in blue ink, consisting of a large, sweeping initial 'A' followed by a series of smaller, connected loops and a long, horizontal tail stroke.

Anthony Beven
Registrar of Indigenous Corporations
2 December 2016